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Administrative Penalties at the Alberta Energy Regulator: A Gentle Slap on the Wrist for Ovintiv

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Decision Commented On: AER Administrative Penalty 202304-03, Ovintiv Canada ULC

I recently turned my mind to the subject of how the Alberta Energy Regulator (AER) makes decisions on financial penalties to companies that contravene the conditions of their project approvals. This post is the first in what may become a series of blogs on the question.

On April 5, 2023, the AER issued a $6500 regulatory penalty to Ovintiv Canada ULC (Ovintiv), formerly called Encana until they moved their headquarters out of Canada in 2019, relating to a contravention of an approval for a sour gas processing facility. This post describes the contraventions and assesses the AER's decision making in setting the amount of the penalty. In short, the AER chose a comically low penalty.

The Contraventions

Ovintiv received regulatory approval for the Pipestone Processing Facility (Pipestone Plant) on August 16, 2018 (first amended on June 11, 2019). Under the amended approval, a high-pressure flare stack had to be 100m above grade to ensure sufficient air dispersal of sulphur dioxide. Ovintiv changed their internal designs during the regulatory process and built the flare stack only 75.3m above grade, lower than the 100m approval and the associated environmental assessment information required. Due to an internal corporate communication problem, Ovintiv did not inform the AER about the change (at 6).

Ovintiv started operating the Pipestone Plant in October 2020, and realized the discrepancy between the actual stack height and the approval on March 16, 2021. Ovintiv "assumed that it would be better to obtain updated dispersion modeling and compliance details before reporting the contravention to the AER" (at 6), so Ovintiv delayed informing the regulator for 49 days until they had obtained an updated air dispersion model that showed the new stack height would still meet the required air quality standards for sulphur dioxide and meet the Alberta Ambient Air Quality Objectives (at 3,5,6). On May 4, 2021, Ovintiv applied to the AER for an approval for the 75.3m stack height that they had already built and were already operating, and informed the AER of the ongoing contravention.

The AER approved the lowered stack height justified by the updated air dispersion model on July 8, 2021, which ended the contravention as the Pipestone Plant approval now matched the actual Pipestone Plant. Ovintiv had operated the Pipestone Plant in contravention of their approval conditions for about nine months.

The Law on *EPEA* Prosecutions and Administrative Penalties

The Pipestone Plant approval is an approval under the *Environmental Protection and Enhancement Act,* RSA 2000, c E-12 (*EPEA*). The AER is the statutory decision maker for the approval under the single window decision maker model enacted by part 1, division 4 of the *Responsible Energy Development Act*, SA 2012, c R-17.3

The offences found by the AER were two violations of section 227(e) of the *EPEA,* pursuant to which contravening a condition of an approval is an offence. The AER determined Ovintiv contravened the sections of their approval that required them to maintain their stacks according to the minimum height set out in the approval (at 2) and the requirement to "immediately report to the Director by telephone any contravention of the terms and conditions of this approval" (at 3).

The AER could have proceeded by prosecution under section 228(2)(b), which sets the maximum penalty for a corporation committing an offence under 227(e) at $500,000, but allows more fines where the offender benefitted monetarily from the offence, the offence continued for more than one day, or directors or officers were involved in the commission of the offence:

> **Additional fine where monetary benefits acquired by offender**
> **230** Where a person is convicted of an offence under this Act and the court is satisfied that as a result of the commission of the offence monetary benefits accrued to the offender, the court may order the offender to pay, in addition to a fine under section 228, a fine in an amount equal to the court's estimation of the amount of those monetary benefits.
>
> **Continuing offences**
> **231** Every person who is guilty of an offence under this Act is liable on conviction for each day or part of a day on which the offence occurs or continues.

And there are even more extensive possibilities for penalties and fines described in sections 232-235 of the *EPEA*. These enforcement options are part of the powerful environmental laws Albertan governments like to describe.

But the offence under section 227(e) of the *EPEA* is also on the schedule to the *Administrative Penalty Regulation*, Alta Reg 23/2003 and so may properly be the subject of an administrative penalty, as described under section 237 of the *EPEA*

> **Administrative penalties**
> **237**(1) Where the Director is of the opinion that a person has contravened a provision of this Act that is specified for the purposes of this section in the regulations, the Director may, subject to the regulations, by notice in writing given to that person require that person to pay to the Government an administrative penalty in the amount set out in the notice for each contravention.

(2) A notice of administrative penalty may require the person to whom it is directed to pay either or both of the following:

(a) a daily amount for each day or part of a day on which the contravention occurs and continues;

(b) a one-time amount to address economic benefit where the Director is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention.

(3) A person who pays an administrative penalty in respect of a contravention may not be charged under this Act with an offence in respect of that contravention.
…

Subsection 237(4) sets out the option of appeal to the Environmental Appeals Board, but the appeal would actually go to the AER Regulatory Appeal process because of the *Specified Enactments (Jurisdiction) Regulation*, Alta Reg 201/2013.

The amounts of administrative sanctions are set out in section 3(1) of the *Administrative Penalty Regulation*.

Penalty assessment
3(1) Subject to subsections (2) and (3), the amount of an administrative penalty for each contravention that occurs or continues is the amount set out in the Base Penalty Table but that amount may be increased or decreased by the Director in accordance with subsection (2).

BASE PENALTY TABLE

		Type of Contravention		
Potential for Adverse Effect		**Major**	**Moderate**	**Minor**
	Major	$5000	$3500	$2500
	Moderate	$3500	$2500	$1500
	Minor to none	$2500	$1500	$1000

(2) In a particular case, the Director may increase or decrease the amount of the administrative penalty from the amount set out in the Base Penalty Table on considering the following factors:
(a) the importance to the regulatory scheme of compliance with the provision;
(b) the degree of wilfulness or negligence in the contravention;
(c) whether or not there was any mitigation relating to the contravention;
(d) whether or not steps have been taken to prevent reoccurrence of the contravention;
(e) whether or not the person who receives the notice of administrative penalty has a history of non-compliance;

(f) whether or not the person who receives the notice of administrative penalty has derived any economic benefit from the contravention;
(g) any other factors that, in the opinion of the Director, are relevant.

> **(3)** The maximum administrative penalty that may be imposed for the purposes of section 237(2)(a) of the Act is $5000 for each contravention or for each day or part of a day on which the contravention occurs and continues, as the case may be.

Justice Keith Ritter wrote a pithy statement on sentencing for corporate environmental offences in *R v Terroco Industries Limited*, 2005 ABCA 141 (CanLII) at paragraph 60:

> The penalty imposed should also have a deterrent effect on others in that industry who may risk offending. In Alberta, most environmental offences arise from the operations of corporations involved in the oil and gas and related petro-chemical industries. These are dominant industries in the province and they utilize many substances harmful to the environment if improperly released. Individuals and corporations engaged in these industries come in all sizes from sole proprietorships to some of the largest multinational corporate conglomerates in existence. What will be a severe fine for one offender may be a pittance to another. The starting point for sentencing a corporate offender must be such that the fine imposed appears to be more than a licensing fee for illegal activity or the cost of doing business: *Cotton Felts*; *General Scrap Iron & Metals*; *Van Waters & Rogers*. The other side of this coin must be that, in the majority of cases, the sentence should not result in economic inviability: *United Keno Mines* at 50; see also s. 718.21(d) of the *Criminal Code*, R.S.C. 1985, c. C-46. The penalty must be more than a slap on the wrist but less than a fatal blow.

The case of *Terroco Industries* was for a prosecution, but the sentencing principles for environmental offences relating to deterrence and the quantum of sentence apply with equal force. Whether the penalty for an offence is set through a prosecution or by administrative penalty, the sentencing principles are the same. (*Atkins and Creekworks Ltd v Director, South Saskatchewan Region, Alberta Environment and Parks*, 16-027-D, 2017 ABEAB 3 (CanLII) at paras 85-86; *Alberta Recycling Company Inc et al v Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, 15-025-027-D, 2016 ABEAB 16 (CanLII) at paras 90 and 107.) This is analogous to how sentencing principles apply in the same manner to an offence is prosecuted by indictment or summary conviction, only the maximum penalty changes due to the mode of procedure. (*R v Solowan*, 2008 SCC 62 (CanLII) at paras 15-16; *R v Sam*, 2013 ABCA 174 (CanLII) at 29.)

The AER Determines the Final Penalty

The AER took 21 months to issue a final penalty decision after the AER had approved the shorter stack. The AER decided to proceed with the administrative penalty approach, a faster and simpler approach that reduces potential penalties while still allowing for substantial penalties.

For count 1 (failure to maintain the stacks according to the minimum height set out in the approval) the AER found it was a major contravention with minor to no adverse effects, resulting

in a penalty of $2500 for not complying with approval for 9 months (at 2-3). For count 2 (failing to immediately inform the AER upon becoming aware of the contravention), the AER again found it was a major contravention, but with minor to no adverse impacts for a penalty of $2500 (at 3)

The AER also applied the factors that may be considered under section 3(2) of the *Administrative Penalty Regulation.* Under factor (a), the penalty was increased by $1000 because of the general importance of complying with approvals as granted, under factor (b), it was increased by $1000 because Ovintiv delayed informing the AER based on an incorrect understanding that it would be better to wait until it could provide updated compliance details to report. The AER also applied factor (b) to *reduce* their penalty by $500 because "Ovintiv acknowledged that if they determine there is a contravention moving forward, they now know that to meet the conditions of the approval they must notify the AER immediately, whether they have a full understanding of the situation or not" (at 4-5).

The final penalty was a total of $6,500 (at 7).

Commentary

Ovintiv's second contravention was massive. The duty to immediately report contraventions of the approval was not a minor clause buried deep in a long approval – it was the very first substantive clause following the definitions section. It is found in almost all *EPEA* approvals granted in the province. When Ovintiv realized they had not built the Pipestone Plant as described in their approval, they did not have dispersion modeling showing that operating the Pipestone Plant as built was consistent with Alberta environmental protection law. They continued to operate the Pipestone Plant for 49 days while they did modelling that would determine if the Pipestone Plant was acceptable to operate. If they had informed the AER immediately, a likely (perhaps almost certain) outcome would have been that they would have been told to shut off the Pipestone Plant. For 49 days, Ovintiv did not know if the Pipestone plant was safe to operate and decided to gamble by continuing to operate. Their total unfamiliarity with the requirement to report their contravention of the approval to the AER meant they did not close a $600 million dollar facility for a single day. What they did not know not only did not hurt them – it seems to have helped them a lot.

During a meeting with the AER:

> Ovintiv requested clarification regarding the base assessment for Count 2 and whether a daily amount for each day that the contravention continued was being assessed. The AER confirmed that a daily amount was not being assessed, but the number of days reinforced the "Type of Contravention" as being "Major". (at 5)

Ovintiv's basic question is a good one. Why was count 2 not assessed for "each day or part of a day on which the contravention occurs" as allowed by section 237(2)(a) of the *EPEA*? The AER's decision to shift the contravention to 'Major' in type for a single day makes a difference of at most $2,500. Choosing not to pursue the "each day" approach lowered the potential penalty by around $120,000.

Under 237(2)(b) of the *EPEA*, the AER could have sought a one-time amount equal to the economic benefit Ovintiv derived as a result of the contravention. In this case, that would have been the profits from the Pipestone Plant for at least the 49 days it was knowingly operated without a suitable approval. This would have been a disgorgement approach, to force the corporation to 'cough up' the profits gained by gambling with public health and environmental safety.

The AER did not need to seek a 'fatal blow' and seek a $25 million or higher fine with an *EPEA* prosecution. However, the AER's penalty decisions should follow the guidance set out in the law and show some economic reasoning about corporate behaviour. In this case, the AER used neither of the options under *EPEA* section 237(2) (and I note that the AER could also have selected both). Instead, the AER chose to treat a multi-million dollar company that deliberately operated a sour gas plant without the required license for a month and a half like a kid who drove to the grocery store and forgot their license and ID at home. The AER's decision to reduce the penalty by $500 because Ovintiv has now read the *first substantive clause in their approval* is a joke funnier than anything I could write about it. The AER has effectively rewarded Ovintv for gambling with the environment and public health by selecting a final penalty that is likely less than Ovintiv's loss would have been from closing or even slowing the operation of the Pipestone Plant for one afternoon. $6,500 is hardly even a slap on the wrist in this case.

The decision makes it obvious that the AER is not serious about enforcing the law. For any corporation considering operating without a proper license, this decision is an invitation instead of a deterrent. Albertans should be aware that the AER's focus on cutting red tape and saving industry money has made the AER worthless at enforcing the law.

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